Quid Novi

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MCGILL UNIVERSITY FACULTY OF LAW
FACULTÉ DE DROIT UNIVERSITÉ MCGILL

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SOUTH AFRICA
DIVESTMENT ACCEPTED

The first General Assembly was convened on September 29. About 180 people showed up, mainly because of their interest in the 20% issue which, with divestment, constituted the agenda.

The 20% Issue

Some of the arguments were already put forward in the LSA Council meeting; they will not be repeated here (see story p. 4).

John Webster joined Bruce Fitzsimmons as one of the few who thought that the 20% issue was a good idea. He stressed the commercial reality of the importance of marks. He also pointed out that not only would the top 20% in question benefit from this idea since they will get preferential treatment, but that this approach would also benefit the next graduating class if those 20% are doing well in the law firms. Moreover, according to Webster, there is a correlation between high marks and the success rate in a law firm.

German Civil Rights

"As modern states tend to develop more pluralistic societies, a well-functioning machinery to protect minority rights is needed." Heinrich Schöller, Professor of Comparative Law at the University of Munich, emphasized this point in a lecture given last Thursday at the Law Faculty. The context was a discussion of the German experience with Bills of Rights and some observations about possible comparisons with the new Canadian Charter of Rights and Freedoms.

YOUR WEEKLY SMILE

Student: Professor, can you explain the meaning of Demeanor?

Prof. Scott: Yes, actually, it is said that it is short for an old english - law french expression which states the essential philosophy of how to be a great law professor.

Student: Oh, what is it?

Prof. Scott: Demeanor de bettor.

Legalism inadequate

In order to appraoch the meaning of the German Bill of Rights, which is largely to be found in the first 19 articles of the German Constitution, Prof. Schöller insisted that to examine it as a "mere legalistic framework would be utterly inadequate. Bills of Rights, he argued, demand "broad interpretation" and thus require an understanding of the political and historical backgrounds which produced them. Germany's Bill of Rights differs from Canada's because of the two different historical experiences that gave rise to the two laws.

From Prof. Schöller's standpoint, the basic difference between the national experiences that gave rise to the Canadian Charter and that which gave rise to the German Bill of Rights was that the Canadian Charter had found its way into a well-developed legal tradition while the German Bill was erected in the midst of a destroyed Germany after World War II. The

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Proposal is in the Law Firms Interest

People who did not like the 20% idea at all said that the only reason that law firms were asking for that information was to save themselves time. However, if they have to look at all the resumés they will be more likely to take into consideration other factors on the resumés which might compensate for average marks.

This theme, as well as other important factors, was a common thread through the whole discussion. It was pointed out that factors like having a family or other activities in the law school have an effect on marks and should be taken into account. As a matter of fact, some law firms, according to one speaker, are already looking for people with assets other than only high marks, such as interacting with clients. Connected to this idea was a comment of a first year student that he had chosen McGill law school because it not only looked at marks but at the

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whole Hitlerian order had to be erased and a new one established. It was out of this extreme political and historical crisis that the need for a Bill of Rights arose in Germany. No such crisis was experienced in Canada.

An answer and a confession

Prof. Schöller characterized the German Bill as taking the form of an answer or confession by the German people.

First, the Bill was an answer to the World after the war. Germany would try to resurrect democratic rights in its Constitution.

Second, the Bill was an answer to the Weimar Republic's failure to protect rights and liberties in the face of political extremism. Weimar's Bill of Rights had set forth that the rights guaranteed in it were subject to "established laws" — much in the same way as the Canadian Bill of Rights. This meant it had no controlling effect on the legislature. The 1949 German Bill of Rights, while subject to certain specific limitations, is explicitly binding on the legislature, executive, and judiciary.

Third, the Bill was an answer to the Nazi dictatorship. The basis of Germany's new Constitution would be completely different from Hitler's ideology. According to Prof. Schöller, a liberal "personalist" view was to be found in the Bill of Rights.

Finally, the Bill gave an answer to the division of Germany. It envisaged the re-integration of the two Germanys and set a standard in light of which both parts could be judged.

The German Bill applied

The German Bill has been applied to declare legislation allowing abortion on demand nul and void. Specific criteria stipulating when abortions are to be allowed must be applied. School prayer has been allowed as a matter left to the discretion of parents and their children. The scope of conscientious objection has been cut down. Life imprisonment, provided there is a chance for parole, has been held not to interfere with the right to "free development of the personality." All of these examples, whether the decisions are accepted or not, point to an active new legal order.

Richard Janda

South Africa

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whole personality of the student.

20% Form of Placement

The 20% idea was rejected by one student because it was a form of placement, and the law school should try to place all students, not only the top 20%.

This comment was supplemented by the suggestion that the Dean should send a letter saying that the law school considered all their students as good as the top 20% of any other law school. It seems that the feelings of most students were reflected by a comment of Dan Barker that there was no need to give that kind of information, since those 20% would make it perfectly clear what their rank is.

The idea of giving information was rejected 154-26.

The Divestment Issue

The divestment issue was proposed by Rick Goldman, Peter Villani and Lenny Abromowicz, who gave a short statement to start the discussion. They appealed to the sense of justice of the law students in supporting the proposal to divest the LSA money from the Bank of Montreal. Before the substantive discussion started, practical points, such as the possibility of transferring to other "clean" institutions, were resolved with the assurance that other banks without connections to companies investing in South Africa could be found. Several of these banks even offer better advantages than the Bank of Montreal. During the main discussion three opinions developed.

South Africa is a Democracy

The first one, presented by Wayne Burrows and Brian Mitchell, rejected the motion. Burrows advanced the following reasons: the profit rate of the Bank of Montreal might be affected by the divestment and some people in Canada live off those profits.

He asked the audience to consider the other side of the story, to look at what was happening in Poland, Roumania, and other countries where human rights were violated. At least South Africa, in his opinion, was a democracy, where blacks have equality under the law, which was more than could be said of any other country in Africa. Finally, he asked the question who was going to be hurt more, the whites or the blacks?

Brian Mitchell went a step further. He pointed out that the South African government was trying to change the situation by making black unions legal, by liberalizing the newspapers and by decreasing wage differences between whites and blacks. The situation was a very complicated one and for that reason he accused the proposers of the motion of being people who did not know what was going on.

The Motion was Hypocritical

The second opinion as expressed by Al Garber, considered the motion a mere gesture, a token and therefore hypocritical. Students would ease their conscience by voting for the motion and nothing else. A real commitment would be when the money would be given to Amnesty International.

This idea was countered by several people who pointed out that tokens had led to revolutions. Stephen Fogarty mentioned that it was still a $10,000 token.

The third opinion, i.e. people who agreed with the motion, was not much brought forward. It was said that the motion was basically moral without much practical effect. Brian's comments were responded to with the remark that things were changing in South Africa, because of the pressure put on them and more pressure was still needed, since the blacks were still being screwed.

The majority agreed with this analysis and the third opinion prevailed with 94 people in favour of the motion, 11 against, and 13 abstentions.

Joseph Rikhof

LSA COUNCIL NON-ELITIST

Most of the time during the LSA Council meeting of September 28 was consumed with the discussion of whether or not the Dean should give out information regarding the top 20% of the graduating class.

But before this discussion started, some other shorter items were brought to the Council's attention. Stéphan LeGouëff asked the Council members to think about changing the LSA constitution and a bylaw because he thought it might be wise to add to the requirements for treasurer the criteria that this position could not be fulfilled by a first-year student.

Tim Baikie asked for volunteers for a committee to submit a proposal from the law school to the Student Rights Charter, which is presently in the process of being developed.

New Speaker

Todd Sloan was chosen in a closed session as speaker of the LSA Council.

The request of the McGill Choral Society for financial support was rejected and an attempt by Tim Baikie to discuss a general policy regarding subsidizing groups was cut short by the remark that each request should be decided on its own merits.

Stéphan proposed a motion to the effect that smoking should not be allowed during council meetings. An amendment was made by the president which called for a segregation of smokers and nonsmokers, of which the first ones sit close to open doors. Both the amendment and the motion ended up in a tie (7-7) and the president, a smoker, decided for a segregation in a bigger room. The obvious physical split betweens smokers and nonsmokers fortunately did not have any effect on the subsequent discussions.

The 20% Issue

From the start it was clear that the majority (86% or 12 persons) was against making this kind of information public. Only two persons were in favour of this measure, namely Bruce Fitzsimmons and Todd van Vliet. Bruce was of the opinion that the primary consideration of hiring firms is marks and that people who had worked hard during their studies should get extra consideration.

Todd thought the law school would be prejudiced against by not giving out this information, because law firms which would get the same kind of information from other law schools would not even bother to interview McGill students.

As said, the majority was against this 20% concept. The reasons varied, however. Fred Hoefert considered the legal aspects by mentioning that it might very well be prohibited by a new proposed piece of Quebec legislation which would require individual permission before such information can be given out.

Other council members took into account the practical side of the issue; Tim Baikie pointed out that with the diversity in courses and marking, belonging to the 20% did not reflect the real abilities. Along the same line was a remark of Suzanne Michaud who doubted the validity of this information, since it would be given in the third or fourth term of the student's studies.

According to Stéphan, the top 20% would have no problem finding jobs so why indulge in volunteering this information. The question to this rhetorical question was given by Mark Dresser, who pointed out that the law firms should do the work by compiling all the data sent to them.

Ethical Aspects

The third group of people was mostly concerned by the ethical aspects of this proposal. Dougal Clark expressed the fear of fiercer competition if such a system would be introduced, while Stéphan found the whole idea discriminatory and unfair, since other equally important factors such as extra-curricular activities and attitude during interviews were not considered at all.

Stephen Fogarty wondered what would happen if certain firms would ask information other than marks — should this be given out?

Stéphan suggested that the job bank should be more aggressive as an alternative method to giving out information.

In the end the motion to recommend the Dean to continue in the interest of the student body his policy of not releasing a selective list, was accepted.

The Divestment Issue

It was decided that the discussion of this issue should be left until the General Assembly the following day. Only a couple of practical matters were straightened out. Fran Boyle announced that a letter was sent to the McGill Daily to point out that the LSA Executive had been quoted inaccurately in one of the Daily's articles.

Roger Cutler said that the consequences of transferring the money would be minimal, assuming that a "clean" bank could be found.

Joseph Rikhof

TO: All B.C.L. III Students
FROM: Anthony Martino, President

Although I have been acclaimed to the position of your class President, I would like to think that I have espoused the basic opinions of the majority of the various members of our level. As your humble representative, I shall continue to hold the views that best serve the numerous interests of B.C.L. III.

Inevitable issues that will arise throughout the year shall be considered with you in mind, as a class, as well as an individual. Hence, one need not hesitate to bring any matter to my attention, and be assured that it will be taken care of with utmost concern.

Quid Novi

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Editorial

Professors who break the rules

We all hear the gossip that circulates about which professors are good and which are bad and why. It's part of a healthy information and mutual reinforcement system. But from time to time the tenor of such comments causes one to ask: "What do students really want?" I am not convinced that the appraisal of classes which goes on around the school takes full account of the radically different approaches to legal education which exist and ought to exist. Students all too easily cast their classes into a "rule-orientated" mold.

Law is not a clear "exact science". And if it is made to appear simple and composed of rules to be memorized, the competing interests at stake in the law are obscured. This does not mean that the ideal law school class should be a confusing muddle. But the student presupposition is often that a quantity of information "X" should be spat out in every class so as to give the student percentage "Y" of what is needed for the final exam. A professor who seeks to expose the various perspectives which can be brought to bear on legal problems and the kinds of principles which underlie rules, risks arousing students' ire for being too vague and undirected.

While a lawyer is a kind of technician, anyone in the legal profession takes on a responsibility to consider the effect of the argument they make. A client's interest may be at stake, but often the client's problem is an instance of a wider problem in the community. "Black letter law" strictly speaking doesn't exist. Every rule demands interepretation. Enter the need to consider the wider context of principles and perspectives.

I, for one, applaud the efforts of those few members of the faculty who take on the challenge of going behind the superstructure of "rules of law" to consider what the law really is and what it ought to be. A law professor who does this may abstract from particular cases, articles, or doctrine. And there must be an awareness on the professor's part that not every issue can be reduced to first principles. But such a professor elevates law from bureaucratic dabbling to the level of social responsibility. Students should be prepared to rise to that level of questioning and to demand that it occurs more often at this law school.

Richard Janda

ANNOUNCEMENT

Last year Quid Novi solicited short literary works from students and staff in calling forth the legend of F.R. Scott. We got a lot of publicity when he came to watch the constitutional decision with us on T.V. in the Moot Court room. The response was overwhelming. We discovered a mass of materials. Amongst other we found a Business Association prof- Association professor who had written two books of poetry and a novel called The Man Who Lived Near Nelligan. Professor Rod Macdonald's wife Shelley Freedman did the typesetting and design for it. Small world. proof that humanities and business can mix. There was also a third year B.C.L. fellow who wrote about ambition. As a friend of the editor it was easy for him to get published. But the friend kept saying "Next week". We also found the unpublished author of a novel and a book of poems of great talent in second year B.C.L. - Robert Stephen. Who can forget Ruffles? Or the first year French girl who wrote Eskimo poetry? Whatever type you are please submit. To get to the point: publish or perish!

LETTERS

Dear Sir,

Mr. Daniel Gogek's article entitled "Let's Win Back Our Pride," which appeared in the September 24 issue of Quid Novi was certainly "something to write home about."

While I appreciate the writer's sentiment in delegating responsibility for our "poor showing" in National Moots, as a member of the 1982 Gale Cup contingent I would like to state that my partner and myself are quite willing to shoulder the responsibility. He has in fact been banished to Toronto and must hang his head in remorse every day as he passes Osgoode Hall court house. I await a subsequent fate next year.

Our pathetic condition aside, it was our humble opinion that this faculty does not approach competitive moots with the same zest as other law schools. Faculty members at other schools are intensely involved with all aspects of the program. Students are grilled and highly prepared. Our own inability was compounded by the fact that no one told us that pleading styles were fundamentally different from what we had experienced at McGill. In fact, no one told us very much at all.

This year it is commendable that the run-offs for competitive moots are being held far in advance of the competitions. I sincerely hope that members of this year's team will approach the three remaining members of last year's team for advice both as to mooting procedure and the preparation of the written and oral arguments. The members of the Moot Court Board responsible for the competitive moots probably should have done this but they have not. The onus is thus on the selected and former team members to get together in preparation for the competition.

At the same time my partner, David Ramsay and myself were kindly assisted by Prof. G. Blaine Baker. Prof. Baker had no formal association with the team but he still managed to provide direction and actually attended our dismal performances. We appreciated his efforts and they should be generally recognized.

Mr. Gogek should also consider that courses in advocacy offered by the bar are generally recognized as being beneficial to someone who has actually had a certain amount of court room experience and is familiar with the terrain. In other words, Mr. Gogek's solution to our showing is probably a band-aid measure at best. Where simpler and more concrete steps are readily available I feel that they provide a more attractive alternative.

Yours truly,
John P. Webster

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till the National League of Cities case. The case involved the extension of the wage and hour provisions of the Fair Labor Standards Act to most state employees. For the first time in four decades the Supreme Court held a congressional regulation of commerce to be an unconstitutional intrusion upon the sovereignity of state and local governments. The courts avoided a return to the earlier substantive tests which involved identifying what was in commerce and what was not, eg. manufacturing (see United States v. E.C. Knight Co., 156 U.S. 1 (1895) for a decision of this sort) but chose to sketch the essence of federalism with references to "coordinate elements" and as needing "separate and independent existence". The Court effect was attempting to pour content into the notion of federalism by defining the requirements and incidents of a distinct state level of government.

Continued Next Week

Notice re: FOREIGN SERVICE EXAMINATIONS

The Department of External Affairs' annual Foreign Service examinations will be held Saturday, October 16, 1982. External Affairs is going out of its way this year to encourage interested parties to write the exams, citing the recent restructuring of the department, and strengthening of the four stream functions — Political/Economic, Commercial/Economic, Social Affairs (formerly Immigration), and Development Assistance (formerly CIDA) as reasons for enthusiasm.

In a letter to the Dean, a personnel director for the Trade Commissioner Personnel Administration section of External points out that there is no reason to believe that Foreign Service hires very few people for new positions. In fact, this year they will be looking for approximately 120 new employees.

Foreign Service officers will be visiting campuses the week of October 4-8. Exact times and locations for the examinations are listed below. For more information, see the pertinent document in the LSA office.

In English	In French
9 a.m. Saturday, Oct. 16, 1982 Concordia University 455 DeMaisonneuve W. Hall Bldg., Room H. 937	9 a.m. Saturday, Oct. 16, 1982 University of Montreal 3200 Jean Brillant Pavillon 3200, Localisateur 14 Local A2285

American Corner: What Federalism? (part one)

Alan Alexandroff

Hot from my pursuit of the Constitutional Grail after Constitutional Law here at McGill, I was determined this summer to uncover the course of federalism in the American legal community. I was given the opportunity when I attended a legal conference in Indiana over the summer. Naively, as it turned out, I assumed, given the trumpetings of "New Federalism" by the current American administration, I'd be met with a chorus of eager debaters on questions of federalism among the lawyers and political scientists alike. Wrong!

Nixon the Federalist

Two truths were presented to this rather too eager Canadian federalist. The first concerned New Federalism. This, as it turns out, is a concept that first received the light of day under President Nixon, which might account for the slight distaste evident for it among lawyers and political scientists. As happens with policies of this sort, the consequences of Nixon's New Federalism turned out to be different than those originally announced. Advocated as the means to return power to the states and end the overcentralization in Washington, programmes including large numbers of grant-in-aid, and revenue sharing ones did just the opposite. Conditional standards attached by Washington to such programmes and the dependency on Washington generated by the financial watering trough tied state interests even more firmly to Washington.

The rather tepid response to President Reagan's New Federalism equally reflects the suspicion of those "in the know", particularly State officials, of Reagan's hidden agenda. Though the Administration publicly supports the need to bring authority to the level of government closest to the people, the hidden agenda is a determination to shrink the size of government. Behind all the proposals to switch aid to dependent children to the States in return for Medicare, is a strong belief among Reaganites that moving authority to the States will limit, if not end, those programmes — given the conservative gleam in State legislators' eyes — and will have the added benefit of shrinking the costs to the federal government where there is little room to squeeze given the determination to keep up defense spending.

"Dusty Federalism"

The second truth which came as a more notable shock was that the Americans at the Conference regarded federalism as quaint but outdated — which might I add was how I was regarded as soon as I tried to raise the "dusty" issue. At least among the lawyers I met, there was virtually no support for federalism as a political or legal objective. Indeed one southern law teacher was so taken aback by my comments on federalism that he announced — rather proudly — that it was clear that the Constitution was constructed by the Founders without a serious concern for federalism. My goodness, and from a southerner as well!

But as was explained to me, the legal community has become so national in perspective, so committed to individual rights issues that have dominated the legal battleground since 1937, so focused on federal courts and broad overarching application of decisions, that it is not in the legal community's interest to support policies that would revitalize old institutions and create new arguments long forgotten by legal educators.

Courts Give New Life

As it turned out, however, my quest was not quite over. For, in a quiet way, and haltingly, it appears that new life is being breathed into federalism and this by what would appear to be a strange source, the courts. The courts, excluding the Supreme Court, have given the green light in several cases to the principles of federalism. The consequence of this handful of decisions has been to signal a new sensitivity by the Court to the shrinking of state authority. The decisions for the first time have offered — if only unclearly — a limit to Congressional authority.

The Supreme Court's course emerges most clearly in two key cases that have struck at the heart of Congress's nationalizing power through the Commerce Clause. The first case occured in 1976; National League of Cities v. Usery 426 U.S. 833 (1976), and more recently in Montana v. Commonwealth Edison Co. 69 L Ed. 2d 884, 101 S.Ct 2946 (1981). Together they reach the great issues of state power — regulation on the one hand, taxation on the other.

Commerce Clause

The Commerce Clause power, Article I section 8, reads: "The Congress shall have Power...to regulate Commerce with foreign Nations, and among the several states, and with the I Tribes...". Its presumed scope was first expressed by Chief Justice Marshall in 1824 in the Gibbons v. Ogden 22 U.S. (9 Wheat) I, 208 (1824). It was however strictly hemmed in by subsequent court decisions until the New Deal. Then in a series of decisions beginning with NLRB v. Jones & Laughlin Steel Corp. 301 U.S. I (1937) The court swept away the traditional doctrine and enabled Congress through the Commerce clause to regulate areas of the economy which had previously been regarded as not in commerce. Congress could thus regulate issues such as health, wages, hours, and pensions, in the expanded areas of interstate commerce. The Commerce Clause became the main Constitutional anchor to modern federal regulation in the United States. It is also the judicial shorthand for viewing and accepting economic activity as national in scope.

The League of Cities Case

This trend appeared inexorable

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